

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

APCC Services, Inc.,)
Data Net Systems, LLC,)
Davel Communications, Inc.,)
Jaroth, Inc. dba Pacific Telemanagement)
Services, and)
Intera Communications Corp.,)
)
Complainants,)
)
)
v.)
)
TS Interactive, Inc.,)
)
Defendant.)

File No. EB-02-MD-012

ORDER

Adopted: December 19, 2002

Released: December 20, 2002

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this Order, we grant a motion for default judgment against TS Interactive, Inc. ("TS Interactive"), thereby resolving a formal complaint proceeding filed by APCC Services, Inc., *et al.* ("APCC" or "Complainants") against TS Interactive pursuant to section 208 of the Communications Act of 1934, as amended (the "Act").¹ The complaint alleges that TS Interactive breached section 276 of the Act² by failing to pay dial-around compensation to Complainants for certain categories of completed coinless calls originating from payphones, in violation of Commission rules and orders.³ For the following reasons, we grant APCC's motion

¹ 47 U.S.C. § 208.

² 47 U.S.C. § 276.

³ See 47 C.F.R. §§ 64.1300-64.1320. The Commission promulgated these rules to implement

for default judgment to the extent indicated below.

II. BACKGROUND

2. Complainants identify themselves as either payphone service providers (“PSPs”) or the agents of PSPs for the billing and collection of “dial-around compensation.”⁴ Defendant TS Interactive is described by Complainants as a switch-based reseller of certain communications services of Global Crossing Ltd. (“Global Crossing”); as such, TS Interactive allegedly provides interstate and intrastate telephone toll service, and carries traffic originating from payphones owned or represented by Complainants.⁵

3. On April 19, 2002, Complainants filed the formal complaint in this proceeding against TS Interactive seeking to recover unpaid “dial-around compensation” that Defendant was allegedly required to pay Complainants under section 276 of the Act and section 64.1300 *et seq.* of the Commission’s rules.⁶ Specifically, Complainants allege that TS Interactive failed to pay them dial-around compensation, despite entering a contract with Global Crossing in which TS Interactive assumed the responsibility to make such payments after February 28, 1999.⁷ In accordance with the Commission’s formal complaint procedures, Complainants indicated their desire to have the liability issues resolved prior to the consideration of damages, and requested leave to file a supplemental complaint for damages in the event that the liability issues are resolved in their favor.⁸

4. TS Interactive participated in the pre-answer stage of this proceeding by making an initial settlement proposal and by specifically requesting an extension of time to file its answer.⁹ Eventually, however, TS Interactive indicated to Commission staff in a telephone

section 276 of the Act, 47 U.S.C. § 276.

⁴ *APCC Services, Inc., et al., v. TS Interactive*, Complaint, File No. EB-02-MD-012 (filed April 12, 2002) at 2, 11, ¶¶ 1, 21 (“Complaint”). “Dial-around compensation” refers to the per-call payments that interexchange carriers (“IXCs”) must make to PSPs for certain categories of completed coinless calls originating from payphones, including access code calls and calls to subscriber toll-free numbers. 47 C.F.R. §§ 64.1300 *et seq.*

⁵ Complaint at 2, 11, ¶¶ 2, 22.

⁶ Complaint at 3, ¶ 4; 47 C.F.R. §§ 64.1300 *et seq.*; 47 U.S.C. § 276.

⁷ Complaint at 3, 11, ¶¶ 5, ¶ 23; Attachment 2.

⁸ Complaint at 13, ¶ 33. *See* 47 C.F.R. § 1.722.

⁹ *See APCC Services, Inc., et al., v. TS Interactive*, Letter from Douglas R. Hirsch, Counsel for TS Interactive, to Warren Firschein, Attorney, Market Disputes Resolution Division, Enforcement Bureau, FCC, File No. EB-02-MD-012 (May 15, 2002); *APCC Services, Inc., et al., v. TS Interactive*, Letter from Warren Firschein, Attorney, Market Disputes Resolution Division, Enforcement Bureau, FCC, to Albert H. Kramer, Counsel for Complainants, and Douglas R. Hirsch, Counsel for TS Interactive, File No. EB-02-MD-012 (May 31, 2002); *APCC Services, Inc., et al., v. TS Interactive*, Letter from Warren Firschein, Attorney, Market Disputes Resolution Division, Enforcement Bureau, FCC, to Albert H. Kramer, Counsel for Complainants, and Douglas R. Hirsch, Counsel for TS Interactive, File No. EB-02-MD-012 (May 15, 2002).

conference that it did not intend to take part further in this proceeding.¹⁰ Consistent with this stated position, TS Interactive failed to submit an answer to the complaint, as required by the Commission's formal complaint rules.¹¹ In a letter dated July 10, 2002, Commission staff weighed the consequences of TS Interactive's failure to file an answer, and determined that, on or before August 9, 2002 (thirty days from the date of the letter), Complainants had to either withdraw the complaint (in order to file an informal complaint against TS Interactive alleging identical claims) or file a motion for default judgment, and that a failure to take either of these steps could result in a dismissal for failure to prosecute.¹² This date was later extended to September 6, 2002.¹³ Accordingly, on September 6, 2002, Complainants filed a Motion for

¹⁰ See *APCC Services, Inc., et al., v. TS Interactive*, Letter from Warren Firschein, Attorney, Market Disputes Resolution Division, Enforcement Bureau, FCC, to Albert H. Kramer, Counsel for Complainants, and Douglas R. Hirsch, Counsel for TS Interactive, File No. EB-02-MD-012 (July 10, 2002) ("*July 10 Letter*").

¹¹ *Id.* at 2. See 47 C.F.R. §§ 1.724, 1.720.

¹² *July 10 Letter* at 2. We note that this matter was one of a series of similar cases filed by APCC against switched-based resellers for the recovery of dial-around compensation. See *APCC Services, Inc. et al. v. Advanced Business Telephone*, Complaint, File No. EB-02-MD-007 (filed April 12, 2002); *APCC Services, Inc. et al. v. Bee Line Long Distance*, Complaint, File No. EB-02-MD-008 (filed April 12, 2002); *APCC Services, Inc. et al. v. Gadjraj & Sons Import & Export, Inc.*, Complaint, File No. EB-02-MD-009 (filed April 12, 2002); *APCC Services, Inc. et al. v. Orion Telecommunications*, Complaint, File No. EB-02-MD-010 (filed April 12, 2002); *APCC Services, Inc. et al. v. Tekbilt World Communications, Inc.*, Complaint, File No. EB-02-MD-011 (filed April 12, 2002); *APCC Services, Inc. et al. v. United Technological Systems, Inc.*, Complaint, File No. EB-02-MD-013 (filed April 12, 2002); *APCC Services, Inc. et al. v. Vertex Group*, Complaint, File No. EB-02-MD-014 (filed April 12, 2002). The defendants in several of those cases failed to file an answer or otherwise participate in the proceeding. In each case where the defendant failed to answer, the staff required APCC to either withdraw the complaint or file a motion for default judgment, or risk a dismissal for failure to prosecute, to encourage APCC to prosecute these matters to their conclusion promptly. See *APCC Services, Inc. et al. v. Advanced Business Telephone*, Letter from Warren Firschein, Attorney, Market Disputes Resolution Division, Enforcement Bureau, FCC, to Albert H. Kramer and Edward G. Modell, counsel for Complainants, and Robert Gold, President, Advanced Business Telephone, File No. EB-02-MD-007 (dated May 24, 2002); *APCC Services, Inc. et al. v. United Technological Systems, Inc.*, Letter from Warren Firschein, Attorney, Market Disputes Resolution Division, Enforcement Bureau, FCC, to Albert H. Kramer and Edward G. Modell, counsel for Complainants, and S.K. Mohan, President, United Technological Systems, Inc., File No. EB-02-MD-013 (dated May 24, 2002); *APCC Services, Inc. et al. v. Tekbilt World Communications, Inc.*, Letter from Warren Firschein, Attorney, Market Disputes Resolution Division, Enforcement Bureau, FCC, to Albert H. Kramer and Edward G. Modell, counsel for Complainants, and Carl Saling, President, Tekbilt World Communications, Inc, File No. EB-02-MD-011 (dated May 24, 2002); *APCC Services, Inc. et al. v. Vertex Group*, Letter from Warren Firschein, Attorney, Market Disputes Resolution Division, Enforcement Bureau, FCC, to Albert H. Kramer and Edward G. Modell, counsel for Complainants, and Anderson Lin, President, Vertex Group, File No. EB-02-MD-014 (dated May 24, 2002) (each stating that, in similar cases where defendant had not filed an answer and otherwise failed to make an appearance, "Complainants must, on or before July 8, 2002 (forty-five (45) days from the date of this letter), either withdraw the complaint, or file a motion for default judgment, and that a failure to take either of these steps may result in a dismissal for failure to prosecute.").

¹³ *APCC Services, Inc., et al., v. TS Interactive*, Letter from Warren Firschein, Attorney, Market Disputes Resolution Division, Enforcement Bureau, to Allan C. Hubbard, Counsel for Complainants, and Douglas R. Hirsch, Counsel for TS Interactive, FCC, File No. EB-02-MD-012 (August 9, 2002).

Default Judgment on the issue of liability.¹⁴ Consistent with its failure to file an answer, TS Interactive also failed to file an opposition to Complainants' Motion for Default Judgment.

III. DISCUSSION

5. Section 1.724(a) of the Commission's rules requires a defendant in a formal complaint proceeding to file an answer within twenty days of service of the formal complaint, unless otherwise directed by the Commission.¹⁵ Furthermore, section 1.724(d) of the Commission's rules states that "[a]verments in a complaint . . . are deemed to be admitted when not denied in the answer."¹⁶

6. The Commission has at its disposal "a wide range of sanctions to address violations or abuses of [its] formal complaint rules, including summary grant or dismissal of a complaint."¹⁷ Although the Commission's formal complaint rules do not address default judgments specifically, when a defendant fails knowingly to answer a complaint against it, the Commission may find the defendant in default, and may consider the material facts alleged in the complaint to be admitted.¹⁸

7. In determining whether we should issue a default judgment here, we examine the Federal Rules of Civil Procedure for guidance.¹⁹ Rule 55 of the Federal Rules of Civil

¹⁴ *APCC Services, Inc., et al., v. TS Interactive*, Motion for Default Judgment with Supporting Memorandum of Law, File No. EB-02-MD-008 (September 6, 2002) ("Motion for Default Judgment").

¹⁵ 47 C.F.R. § 1.724(a).

¹⁶ 47 C.F.R. § 1.724(d).

¹⁷ *Implementation of the Telecommunications Act of 1996, Amendment of Rules Governing Procedures to be Followed When Formal Complaints are Filed Against Common Carriers*, Report and Order, 12 FCC Rcd 22497, 22610, ¶ 278 (1997) ("Formal Complaints Order"), *recon. denied*, 16 FCC Rcd 5681 (2001). See *Implementation of the Telecommunications Act of 1996, Amendment of Rules Governing Procedures to be Followed When Formal Complaints are Filed Against Common Carriers*, Second Report and Order, 13 FCC Rcd 17018, 17054, ¶ 65 (1998) ("Formal Complaints Second Report and Order").

¹⁸ See *Philippine Long Distance Telephone Co. v. Dialback USA, Inc.*, Memorandum Opinion and Order, 12 FCC Rcd 12023 (Com. Car. Bur. 1997) ("Dialback"); *Computer Phone Services, Inc. v. AT&T Corp.*, Memorandum Opinion and Order, 12 FCC Rcd 766 (Form. Compl. & Inv. Br.-Enf. Div., Com. Car. Bur. 1997); *Texas Cable and Telecommunications Ass'n v. GTE Southwest Inc.*, Order, 14 FCC Rcd 2975 (Cable Serv. Bur. 1999). We note that, at the time of the *Dialback* decision, section 1.724(b) of the Commission's rules explicitly indicated that a defendant's failure to file an answer in a formal complaint proceeding could result in an order entered against the defendant in accordance with the allegations contained in the complaint. See 47 C.F.R. § 1.724(b)(1996). Although this provision no longer appears explicitly in the Commission's rules, the general principle remains, as evidenced by *GTE Southwest, Inc.* (addressing a motion for default judgment in the context of a pole attachment complaint filed pursuant to section 224 of the Act), and the Commission's statements in the *Formal Complaints Order* and *Second Report and Order*. See n.17, *supra*.

¹⁹ Cf., *Formal Complaints Order*, 12 FCC Rcd at 22535, ¶ 85 (formally adopting a rule similar to

Procedure states that, when a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, a default judgment may be entered against it.²⁰ Federal courts construing Rule 55 have held that they have broad discretion in determining the appropriateness of entering a default judgment. Factors a court may consider include: whether the facts alleged in the complaint state a valid claim; whether the defendant has clearly failed to defend; whether the defendant's failure to defend has continued for a significant period of time; whether the defendant's failure to defend derives from excusable neglect or a good faith mistake; whether the defendant's failure to defend has substantially prejudiced the plaintiff's rights; whether the plaintiff has prosecuted the matter properly; whether the claim concerns important matters of public policy; and whether the claim seeks substantial monetary damages.²¹ We find it appropriate to use these factors here. For the reasons described below, applying those factors here, we conclude that complainants are entitled to a default judgment on liability.

8. First, the alleged facts, if true, constitute a violation of law.²² For payphone traffic between October 7, 1997 and November 23, 2001, the Commission's rules and orders required switch-based resellers such as TS Interactive to pay dial-around compensation to a PSP if the switch-based reseller entered into a contract with the first facilities-based IXC requiring the switch-based reseller to compensate the PSP.²³ In this case, the complaint alleges that TS Interactive entered into just such a contract. Specifically, the complaint alleges that on May 3, 1999, TS Interactive entered a contract called a "Payphone Dial-Around Compensation Agreement" with Global Crossing (then known as Frontier Communications),²⁴ in which TS Interactive assumed "sole responsibility for the reporting and payment of per call payphone 'dial-around compensation' charges" for its customers' calls from payphones that were carried

Fed.R.Civ.P. 26(a)(1) for section 208 formal complaint proceedings); *Formal Complaints Second Report and Order*, 13 FCC Rcd at 17052, ¶ 60 (adopting a rule similar to Fed.R.Civ.P. 26(a)(2)(B) for Accelerated Docket proceedings).

²⁰ Fed.R.Civ.P. 55.

²¹ See 10a CHARLES A. WRIGHT, ARTHUR R. MILLER, & MARY K. KANE, *FEDERAL PRACTICE AND PROCEDURE* § 2685 (1998).

²² Consistent with section 1.724(d) of the Commission's rules, we consider these facts to be admitted. See para. 5, *supra*.

²³ See, e.g., *Bell-Atlantic-Frontier, Inc., et al., v. MCI Telecommunications Corp.*, Memorandum Opinion and Order, 2002 WL 1842441 (F.C.C.) (released August 14, 2002) at n.31. See also 47 C.F.R. § 64.1300 (2000).

²⁴ Frontier Communications merged with Global Crossing, which later merged with Citizens Communications Company. See Complaint at 2, ¶ 2 n.1; *Joint Applications of Global Crossing Ltd., and Citizens Communications Company For Authority to Transfer Control of Corporations Holding Commission Licenses and Authorizations Pursuant to Sections 214 and 310(D) of the Communications Act and Parts 20, 22, 63, 78, 90, and 101 of the Commission's Rules*, Memorandum Opinion and Order, 16 FCC Rcd 8507 (Com. Car. Bur., Int. Bur., Cab. Serv. Bur., Wireless Telecom. Bur., 2001); *Global Crossing Ltd. and Frontier Corporation*, Memorandum Opinion and Order, 14 FCC Rcd 15911 (Wireless Telecom. Bur., Int. Bur., and Com. Car. Bur., 1999).

over Global Crossing's network.²⁵ This contract between the parties was effective as of February 28, 1999. Thus, applying the alleged facts to the applicable law, we conclude that the complaint states a valid basis for requiring TS Interactive to pay dial-around compensation to Complainants during the period at issue in the complaint.

9. Second, we conclude that TS Interactive has clearly failed to defend the complaint; that TS Interactive's failure to defend has continued for a significant period of time; and that TS Interactive's failure to defend does not derive from excusable neglect or a good faith mistake. TS Interactive plainly received timely notice of the complaint and of the deadline for filing its answer. Indeed, as stated above, counsel for TS Interactive participated in the early stages of this proceeding, and on one occasion even specifically requested an extension of time to file its answer.²⁶ Moreover, as indicated above, TS Interactive communicated a conscious intent not to participate in this proceeding, and, consistent with that position, failed to respond to the answer, participate in status conferences, or respond to correspondence sent by Commission staff setting forth procedures for Complainants to pursue a default judgment.²⁷ This failure to participate or otherwise defend the complaint has lasted for several months, and TS Interactive has neither offered a legitimate rationale for its failure to participate nor shown any indication that it has had a change of heart regarding its conduct. We therefore find that TS Interactive clearly, knowingly, and repeatedly failed to defend against the complaint.

10. Third, Complainants have been substantially prejudiced by the delay caused by TS Interactive's failure to defend the complaint. As described above, the "Payphone Dial-Around Compensation Agreement" between the parties indicates that Complainants are entitled to the compensation they seek. TS Interactive's failure to participate in this proceeding has delayed the payment of this compensation.

11. Fourth, Complainants have properly prosecuted this case. Complainants have complied with the Commission's formal complaint rules (including the rules regarding service and filing), and have participated in a number of status conferences with Commission staff. Moreover, as discussed above, Complainants entered into settlement negotiations with TS Interactive during the initial stage of this proceeding. Only when further settlement talks appeared fruitless, and TS Interactive indicated its intent to no longer participate in this proceeding, did Complainants file their motion for default.

12. Finally, the claim presented here is not an important matter of public policy, such

²⁵ Complaint at Attachment 2.

²⁶ *APCC Services, Inc., et al., v. TS Interactive*, Letter from Douglas R. Hirsch, counsel for TS Interactive, to Warren Firschein, Attorney, Market Disputes Resolution Division, Enforcement Bureau, FCC, File No. EB-02-MD-012 (May 15, 2002).

²⁷ See, e.g., *July 10 Letter* at 2-3.

as a constitutional or statutory construction issue, but rather is a straightforward, private payment dispute. Moreover, although the complaint does not request specific damages, Complainants do indicate that if TS Interactive is not forthcoming in its responses to discovery requests arising from a subsequent supplemental complaint for damages, Complainants “will seek judgment in the amount of \$99,000.”²⁸ Such an amount is not so large as to preclude a default judgment.²⁹

13. In conclusion, we find that TS Interactive is in default regarding the liability alleged in the complaint. Thus, we grant APCC’s motion for default judgment on liability. In accordance with the Commission’s formal complaint procedures, APCC may file a supplemental complaint for damages within sixty (60) days of the release of this order (unless the 60-day period is extended by order).³⁰

14. In addition, Complainants request that the Commission order the Defendant to pay interest on the past-due dial-around compensation at an annual rate of 11.25%, although Complainants have failed to justify the imposition of such a rate. We deny this request, without prejudice to Complainants’ ability to request a payment of interest in its supplemental complaint for damages. If Complainants decide to request such relief, they must explain the appropriateness of a particular interest rate, based upon past Commission precedent.³¹

IV. ORDERING CLAUSES

15. Accordingly, IT IS ORDERED, pursuant to sections 1, 4(i), 4(j), 208 and 276 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 208, and 276, sections 1.720-1.736 and 64.1300-64.1320 of the Commission’s rules, 47 C.F.R. §§ 1.720-1.736, 64.1300-64.1320, and authority delegated by sections 0.111 and 0.311 of the Commission’s rules, 47 C.F.R. §§ 0.111, 0.311, that the Complainants’ motion for default judgment IS GRANTED to the extent indicated herein.

16. IT IS FURTHER ORDERED, pursuant to sections 4(i), 4(j), 208, and 276 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 208, and 276, sections 1.720-1.736 and 64.1300-64.1320 of the Commission’s rules, 47 C.F.R. §§ 1.720-1.736,

²⁸ Motion for Default Judgment at 5.

²⁹ We note that section 1.727(e) of the Commission’s rules provides that a “[f]ailure to oppose any motion may constitute grounds for granting of the motion.” 47 C.F.R. § 1.727(e). Here, TS Interactive failed to respond to Complainants’ motion for default judgment. This failure provides further support for our decision to grant the Complainants’ motion.

³⁰ 47 C.F.R. § 1.722.

³¹ In particular, Complainants should discuss why an 11.25% rate is appropriate in this case, given the Commission’s recent ruling that the interest rate for payphone cases should match the IRS interest rate. *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Fourth Order on Reconsideration and Order on Remand, 17 FCC Rcd 2020 (2002).

64.1300-64.1320, and authority delegated by sections 0.111 and 0.311 of the Commission's rules, 47 C.F.R. §§ 0.111, 0.311, that the defendant in this proceeding IS IN DEFAULT and the factual averments contained in APCC's complaint ARE DEEMED ADMITTED.

17. IT IS FURTHER ORDERED, pursuant to sections 1, 4(i), 4(j), 208 and 276 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 208, and 276, sections 1.720-1.736 and 64.1300-64.1320 of the Commission's rules, 47 C.F.R. §§ 1.720-1.736, 64.1300-64.1320, and authority delegated by sections 0.111 and 0.311 of the Commission's rules, 47 C.F.R. §§ 0.111, 0.311, that the above-captioned complaint IS GRANTED to the extent indicated herein.

FEDERAL COMMUNICATIONS COMMISSION

David H. Solomon
Chief, Enforcement Bureau